

Jerry L. Rhodes and Donald Floreske d/b/a Rhodes & Associates and Painters' District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO. Case 7-CA-36154

November 29, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

Upon a charge filed by the Union on July 13, 1994, and an amended charge filed by the Union on July 28, 1994, the General Counsel of the National Labor Relations Board issued a complaint on August 30, 1994, against Jerry L. Rhodes and Donald Floreske d/b/a Rhodes & Associates, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent failed to file an answer.

On October 24, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On October 26, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated September 19, 1994, and remailed on September 22, 1994, notified the Respondent that unless an answer were received by October 3, 1994, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been jointly owned by Jerry L. Rhodes and Donald Floreske,

partners, doing business as Rhodes & Associates. At all material times, the Respondent, with an office and place of business in Livonia, Michigan, has been engaged as a subcontractor providing drywall taping, painting, and carpentry services for construction contractors. During the 12-month period ending July 31, 1994, a representative period, the Respondent, in conducting its drywall operations, provided drywall taping, painting and carpentry services valued in excess of \$50,000 to American Quality Homes, Inc., an enterprise located within the State of Michigan, which enterprise is a retail homebuilding contractor. American Quality Homes, Inc., during the 12-month period ending July 31, 1994, a representative period, had gross revenues in excess of \$500,000, and purchased from points located outside the State of Michigan, and caused to be shipped directly to its Michigan facilities and job sites, products, goods, and materials valued in excess of \$50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

All full-time and regular part-time residential tapers and commercial tapers employed by the Respondent at or out of the Respondent's facility located in Livonia, Michigan and/or its prior facility located at 31805 Middlebelt Road, Suite 304, Farmington Hills, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act, herein called the unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

About March 31, 1993, the Respondent, an employer engaged in the building and construction industry, entered into a collective-bargaining agreement effective for commercial work from June 1, 1992, through May 31, 1995, and for residential work from June 1, 1992, through May 31, 1993, whereby it recognized the Union as the limited exclusive collective-bargaining representative of the unit and agreed to continue the agreement in effect from year to year thereafter unless timely notice was given in accordance with the terms of article XXII of the collective-bargaining agreement. Since about March 31, 1993, pursuant to this agreement, the Union has been recognized as the exclusive collective-bargaining representative of the unit by the Respondent without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in successive collective-bargaining agreements, with the agreement for residential work having automatically renewed for a period of 1 year.

The agreement described above obligates the Respondent to make contributions on behalf of unit employees to various fringe benefit funds including, inter alia, the Painters' Union Insurance, Pension and Vacation Funds, through the Painters' Union Deposit Fund (the Deposit Fund) and to submit to an audit on request.

Since about January 13, 1994, the Respondent has employed unit employees at various jobsites, including, inter alia, the Main Street Square project in Royal Oak, Michigan, Schoolcraft College in Livonia, Michigan, and Ruby Tuesdays Restaurant in Sterling Heights, Michigan. Since about January 15, 1994, and continuing to date, the Respondent has failed and refused to make contractually mandated contributions on behalf of the unit to the Deposit Fund.

About April 27, 1994, the Union, by an agent of its Painters' Union Insurance, Pension and Vacation Funds, requested, pursuant to the agreement, that a full comprehensive audit of the Respondent's records be conducted. Since about June 2, 1994, the Respondent has failed and refused to allow the Union's Painters' Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of the Respondent's records.

About June 6, 1994, the Respondent, in writing, by its agent Jerry L. Rhodes, repudiated the agreement and refused to continue to recognize the Union as the limited exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d), and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by failing since January 15, 1994, to make contractually required contributions to the Deposit Fund, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in

Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to honor and abide by the collective-bargaining agreement, make employees whole for any loss of earnings and other benefits, with interest, as prescribed in *New Horizons for the Retarded*, supra, recognize and bargain with the Union, and allow an agent of the Painters' Union Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of the Respondent's records, as authorized by the agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Jerry L. Rhodes and Donald Floreske d/b/a Rhodes & Associates, Livonia, Michigan, its agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to make contractually mandated contributions to the various fringe benefit funds including, inter alia, the Painters' Union Insurance, Pension and Vacation Funds, through the Painters' Union Deposit Fund, on behalf of the unit employees. The unit includes the following employees:

All full-time and regular part-time residential tapers and commercial tapers employed by the Respondent at or out of the Respondent's facility located in Livonia, Michigan and/or the prior facility located at 31805 Middlebelt Road, Suite 304, Farmington Hills, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to allow the Union's Painters' Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of the its records as provided in the collective-bargaining agreement.

(c) Repudiating the agreement and refusing to continue to recognize the Painters' District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO as the limited exclusive collective-bargaining representative of the unit.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required contributions to the various fringe benefit funds retroactive to January 15, 1994, and make whole its unit employees for any loss of benefits or expenses ensuing from its failure to make contractually required contributions to the various fringe benefit funds since January 15, 1994, and for

any loss of earnings and other benefits suffered as a result of the unlawful repudiation of the collective-bargaining agreement on June 6, 1994, as set forth in the remedy section of this decision.

(b) Allow an agent of the Painters' Union Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of the its records, as provided by the agreement.

(c) Honor and abide by the terms and conditions of the collective-bargaining agreement, and recognize and bargain with the Union, as the limited exclusive bargaining representative of the unit.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 29, 1994

William B. Gould IV, Chairman

James M. Stephens, Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to make contractually mandated contributions to the various fringe benefit funds including, inter alia, the Painters' Union Insurance, Pension and Vacation Funds, through the Painters' Union Deposit Fund on behalf of the unit employees. The unit includes the following employees:

All full-time and regular part-time residential tapers and commercial tapers employed by us at or out of our facility located in Livonia, Michigan and/or our facility located at 31805 Middlebelt Road, Suite 304, Farmington Hills, Michigan; but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to allow the Painters' Union Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of our records, as provided by the collective-bargaining agreement.

WE WILL NOT repudiate the agreement or refuse to continue to recognize the Painters' District Council No. 22, International Brotherhood of Painters and Allied Trades, AFL-CIO as the limited exclusive collective-bargaining representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make all required contributions to the various fringe benefit funds retroactive to January 15, 1994, and WE WILL make whole our unit employees for any loss of benefits or expenses ensuing from our failure to make contractually required contributions to the various fringe benefit funds since January 15, 1994, and for any loss of earnings and other benefits suffered as a result of our unlawful repudiation of the collective-bargaining agreement on June 6, 1994, with interest.

WE WILL allow an agent of the Painters' Union Insurance, Pension and Vacation Funds to conduct a full comprehensive audit of our records, as provided by the agreement.

WE WILL honor and abide by the terms and conditions of the collective-bargaining agreement and recog-

nize and bargain with the Union as the limited exclusive bargaining representative of the unit.

JERRY L. RHODES AND DONALD
FLORESKE D/B/A RHODES & ASSOCI-
ATES